No. 04 503

Supreme Court, U.S.
FILED
AUG 9 2004

In The

Supreme Court of The United States

LEYTON WINT,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Where a district court's court judgment is affirmed based on its findings that disputed sentencing guidelines enhancements were not clearly erroneous, may a Court of Appeals refuse to consider a rehearing petition based on this Court's decision in *Blakely v. Washington*?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The appellant was Leyton Wint while the respondent was the United States of America.

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CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

The relevant constitutional, statutory, and Sentencing Guidelines provisions involved are set forth in an appendix to the petition.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Leyton Wint, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered May 12, 2004.

OPINION BELOW AND JURISDICTION

On May 12, 2004, the Court of Appeals entered a summary order (Docket No. 03-1685) affirming the judgment of conviction rendered against Leyton Wint in the United States District Court for the Southern District of New York. Subsequently, Petitioner filed a motion in the Court of Appeals to recall the mandate and for rehearing on the basis of this Court's decision in *Blakely v. Washington*, 124 S.Ct. 2531, 2004 U.S. LEXIS 4573 (June 24, 2004). That motion was denied on July 21, 2004. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254, subd. 1.

STATEMENT OF THE CASE

This petition seeks review of an order of the United States Court of Appeals for the Second Circuit entered May 12, 2004

which affirmed a judgment of the United States District Court, Southern District of New York and the Second Circuit's July 21, 2004 summary denial on Petitioner's *Blakely* rehearing petition.

The Court of Appeals decision affirmed a District Court judgment, entered October 18, 2001, convicting Leyton Wint of conspiracy to violate the federal firearms law in violation of 18 U.S.C. 371, dealing in firearms without a license in violation of 18 U.S.C. 922(a)(1)(A), interstate travel with the intent to deal in firearms without a license in violation of 18 U.S.C. 924(n), and interstate transportation of firearms in violation of 18 U.S.C. 922(a)(3), and sentencing him to serve 41 months' imprisonment, three years' supervised release, and a $400 special assessment. Petitioner is serving the sentence.

On appeal, Mr. Wint challenged the application of several sections of the United States Sentencing Guidelines that resulted in a higher guideline range than was admitted by him. Petitioner had opposed a three-level enhancement for managerial role in the

offense. He opposed a findings as to the number of firearms alleged to have been attributed to his part in the conspiracy. He opposed a finding that firearms were used in connection with another felony offense. The District Court made factual findings on these disputed issues without a jury trial and by by preponderance of the evidence.

The Court of Appeals affirmed all three findings on the basis of its conclusion that the District Court's decisions imposing these enhancements were not "clearly erroneous."

The appellate court's decision was rendered on May 12, 2004, almost six weeks prior to this Court's important decision in *Blakely*. The mandate had issued on June 2, 2004. Shortly after *Blakely* was published, Mr. Wint filed a motion to recall the mandate and for rehearing (and rehearing en banc) solely on the basis of the *Blakely* decision. This motion was summarily denied without opinion.

REASONS FOR GRANTING THE WRIT

POINT I

A COURT OF APPEALS MAY NOT REFUSE TO CONSIDER A REHEARING PETITION BASED ON THIS COURT'S DECISION IN *BLAKELY V. WASHINGTON* WHILE THE CASE IS ON DIRECT APPEAL AND WHERE THE DEFENDANT INITIALLY APPEALED THE SENTENCING COURT'S FINDINGS ON DISPUTED SENTENCING GUIDELINES ENHANCEMENTS.

The Second Circuit itself acknowledged that *Blakely* may well affect federal criminal sentencing when it asked this Court to take up this issue. *United States v. Penaranda*, 2004 U.S. App. LEXIS 14268 (2d Cir. July 12, 2004)(en banc). We are, of course, aware that this Court has granted certiorari in the consolidated cases of *United States v. Fanfan*, 03-47 P-H (D. Me. June 28, 2004), cert. granted, *Fanfan v. United States,* 2004 U.S. LEXIS 4789 (August 2, 2004) and *United States v. Booker*, 2004 U.S. App. LEXIS 14223 (7th Cir. July 9, 2004), cert. granted, *Booker v. United States,* 2004 U.S. LEXIS 4788 (August 2, 2004) .

In view of this Court's decision in *Schriro v. Summerlin*,

124 S. Ct. 2519, 2526, 159 L.Ed.2d 442 (2004), that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) claims may not be applied retroactively on collateral review, it is critical for Courts of Appeal to hear and decide *Blakely* claims while the case is still on direct appeal. Otherwise, defendants like Leyton Wint will lose their only chance to remedy a constitutional error resulting in increased punishment. Some lower courts have already found that *Blakley* claims may not be brought by habeas corpus pursuant to 28 U.S.C. § 2255. *See e.g., Garcia v. United States*, 2004 U.S. District LEXIS 14984 (N.D.N.Y. August 4, 2004).

As in *Blakely*, the sentencing court in Wint's case based its enhancements upon findings of fact that it made which were not established by admission or proof to a jury beyond a reasonable doubt. The sentencing court had to make additional findings in order to authorize imposition of the enhancements and could not base the enhancements solely on the defendant's admissions to the

essential elements of the conspiracy and substantive firearms offenses. Under the guidelines scheme, had the court imposed the enhanced sentence without making the required findings it would have been reversed.

In *United States v. Leyton Wint*, 2004 U.S. App. LEXIS 10597 (2d Cir. May 12, 2004), a panel found the district court's factual findings:

- that Leyton Wint deserved a 3-level role enhancement pursuant to U.S.S.G. § 3B1.1(b);
- that he deserved a 5-level enhancement for more than 25 firearms pursuant to U.S.S.G. § 2K2.1(b)(1)(E) instead of a 3-level increase for between 8 and 12 firearms or a 4-level increase for between 13 and 24 firearms; and
- that he deserved a 4-level enhancement pursuant to U.S.S.G. § 2K2.1(b)(5) for use or possession of a firearm in connection with a drug distribution

were not clearly erroneous.

All three holdings were based on factual findings made by the district court by a preponderance of the evidence and over the defendant's objection. Leyton Wint never admitted any of the facts that were used as the basis for these enhancements. These factual findings resulted a guideline level of 21 in Criminal History Category II and yielded, a sentencing range of 41 to 51 months. Without these enhancements, Wint's offense level would have been calculated based on a base offense level of 12 pursuant to Section 2K2.1(a)(7) with 3 levels added for between 8 and 12 firearms and two levels deducted for acceptance of responsibility yielding an offense level of 12 and a sentencing range of 15-21 months. Wint squarely placed the disputed sentencing factors at issue so that their determination by a judicial officer seriously affected the fairness of the proceeding at least as much as did the determination that Blakely acted with "deliberate cruelty" so as to justify an exceptional sentence 37 months above the standard range in his case.

Wint objected to the pre-sentence report, denying he was a leader, alleging that he was responsible for no more than eight firearms, and disputing the claim that he used firearms in connection with another felony. When Wint spoke to the probation officer, he denied recruiting anyone to purchase firearms and asserted that the conspiracy's leader himself had already found willing "straw purchasers" when Wint entered the conspiracy. He described his role as "impassive" and suggested he was more a "runner" and a "gofer" than anything else.

With regard to the number of weapons involved, Wint admitted in his Rule 11 proceeding he was involved in several trips in which 5 or 6 firearms were purchased. He never agreed he was responsible for more than 25 firearms as required by Section 2K2.1(b)(1)(E). The trial court sentenced him on her own factual findings as to the scope of his relevant conduct.

With regard to the finding that Wint used a firearm in connection with another offense, Wint denied this allegation but

the court credited the testimony from the co-defendant's trial at which Wint did not participate.

These factual findings constituted an unconstitutional usurpation of the jury's role even if they were in keeping with the state of the law at the time.

Indeed, Justice O'Connor's dissenting opinion in *Blakely* essentially takes the view that the principles enunciated by the majority all but dictate that the Federal sentencing guidelines must be found unconstitutional. "If anything, the structural differences that do exist [between the Washington scheme and the Federal sentencing guidelines] make the Federal Guidelines more vulnerable to attack." Id. at *49 (O'Connor, J., dissenting). Justice O'Connor then goes on to cite as examples the multiple firearm and use in connection with other offense enhancements that were applied in Wint's case:

> The Court flatly rejects respondent's argument that such soft constraints, which still allow Washington judges to exercise a substantial amount of

> discretion, survive *Apprendi*. *Ante*, at 8-9. This suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate. See, e.g., USSG §2K2.1 (increases in offense level for firearms offenses based on number of firearms involved, whether possession was in connection with another offense, whether the firearm was stolen); §2B1.1 (increase in offense level for financial crimes based on amount of money involved, number of victims, possession of weapon); §3C1.1 (general increase in offense level for obstruction of justice).

Blakely, supra at *50-51. Accordingly, the guidelines can be applied only to the extent that the factual findings supporting them are established beyond the defendant's admissions. *See United States v. Marrero*, 2004 U.S. Dist. LEXIS 13593 (S.D.N.Y. July 21, 2004)(virtually every court that has compared the two systems has concluded that the federal Guidelines are, if anything, "more vulnerable to constitutional attack than the Washington guidelines the Supreme Court invalidated in *Blakely*"); *United States v. Shamblin*, 2004 U.S. Dist. LEXIS 12156 (S.D.W.Va. June 30,

2004)(applying *Blakely* to reduce 240-month sentence to a range of 6 to 12 months).

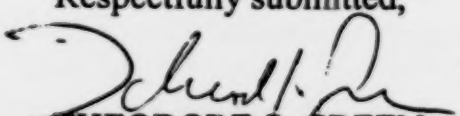
Wint's direct appeal was pending when this Court issued its decision in *Blakely*. Accordingly, that decision applied to his appeal. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed2d 649 (1987)(all "new rules for the conduct of criminal prosecutions," must be applied retroactively to all cases "pending on direct review or not yet final" at the time the new rule is decided). Because the time for filing Wint's petition for certiorari had not expired, his direct appeal has not expired and is not yet final. Unless this Court directs the Court of Appeals to at least consider Wint's case in light of *Blakely* (and this Court's expected decision in the consolidated *Booker* and *Fanfan* cases), an illegal sentence will be uncorrected.

Courts of Appeal should not be permitted to sweep unconstitutional sentencing errors under the rug by failing to hear challenges made while cases on are direct appeal.

CONCLUSION

For the reasons stated above, petitioner respectfully submits that the petition for a writ of certiorari should be granted and the sentence vacated and remanded to the Court of Appeals for reconsideration in light of *Blakely v. Washington.*

Respectfully submitted,



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Dated: August 6, 2004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Motion Information Form

U.S.C.A. Filed July 18, 2004

Docket No. 03-1685 United States v. Wint

Motion for: to file a rehearing petition out of time.

Set Forth below precise, complete statement of relief sought:

permitting appellant to file a panel rehearing and rehearing en banc petition out of time and to recall the mandate while rehearing is pending.

Moving Party: Leyton Wint

Opposing Party: United States

X Appellant/Petitioner

Moving Attorney: Richard D. Willstatter
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Court-Judge/Agency Appealed from:
Hon. Colleen McMahon, USDJ

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Please check appropriate boxes

Has Consent of other counsel:
A. Been Sought? Yes No X
B. Been Obtained? Yes No X
Oral Argument Requested? Yes No X
Has Requested Relief been made below? Yes No
Has relief been previously sought in this court? Yes No
(requests for oral argument will not necessarily be granted)

Requested return date and explanation of emergency:
Has argument date been set? Yes No
If yes, enter date: Case previously argued
Signature of moving attorney: Date: July 9, 2004
Richard D. Willstatter Has Service been effected? Xyes No
July 9, 2004

ORDER

Before: Hon. Dennis Jacobs, Hon. Chester J. Straub, Hon. Richard C. Wesley, *Circuit Judges*

IT IS HEREBY ORDERED that the motion be and it hereby is DENIED.

For the Court:
Roseann B. MacKechnie, Clerk
by *Arthur M. Heller*
Arthur M. Heller
Senior Motion Attorney
Filed July 21, 2004

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 12th day of May, two thousand four.

PRESENT: HON. DENNIS JACOBS,
HON. CHESTER J. STRAUB,
HON. RICHARD C. WESLEY,

Circuit Judges.

- -x

UNITED STATES OF AMERICA,

Appellee,

-v.- 03-1685

LEYTON WINT, aka Choc,

Defendant-Appellant.

- -x

APPEARING FOR APPELLANT: RICHARD D. WILLSTATTER, Green & Willstatter, White Plains, NY

APPEARING FOR APPELLEE: JUSTIN S. WEDDLE, Assistant United States Attorney, New York, NY (David N. Kelley, United States Attorney, and Gary Stein, Assistant United States Attorney, of counsel)

Appeal from the United States District Court for the Southern District of New York (McMahon, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Defendant Leyton Wint appeals from a judgment convicting him of conspiracy to violate firearms laws and related substantive offenses, which was entered in the Southern District of New York (McMahon, J.) following his guilty plea. Familiarity is assumed as to the facts, the procedural context, and the specification of appellate issues.

1. This Court reviews de novo the district court's conclusion that Wint deserved a role enhancement under USSG § 3B1.1(b) and for clear error the factual findings underlying this determination. E.g., United States v. Paccione, 202 F.3d 622, 624 (2d Cir. 2000). In light of the district court's findings regarding Wint's role in the conspiracy, which were not clearly erroneous, it properly determined that Wint "exercise[d] some degree of control over others involved in the commission of the

offense. . . or play[ed] a significant role in the decision to recruit or to supervise lower-level participants." United States v. Burgos, 324 F.3d 88, 92 (2d Cir. 2003) (internal quotations and citation omitted) (alterations in original). Accordingly, the district court appropriately applied a three-level role enhancement.

2. When relevant conduct hinges on what is "reasonably foreseeable," that determination is a factual finding subject to review for clear error. E.g., United States v. Molina, 106 F.3d 1118, 1121 (2d Cir. 1997); United States v. Ekwunoh, 12 F.3d 368, 370 (2d Cir. 1993). The district court found that the conspiracy involved more than twenty-five firearms and that this was "reasonably foreseeable" to Wint and "in furtherance of [his] jointly undertaken criminal activity." USSG § 1B1.3(a) (1) (B). The court's finding was not clearly erroneous and was properly relied on to increase Wint's offense level. See id. § 2K2.1(b) (1) (C).

3. A district court's decision regarding whether to sentence consecutively or concurrently under USSG § 5G1.3(c) is reviewed for abuse of discretion. United States v. Livorsi, 180 F.3d 76, 82 (2d Cir. 1999). "Nothing in the language of the guideline or its Commentary requires district courts to make specific findings with respect to any or all of the factors listed in the Commentary or § 3553 (a) ." United States v. Velasquez, 136 F.3d 921, 924 (2d Cir. 1998). "We have never required judges to state on the record that they considered the mandatory factors affecting sentences of imprisonment, probation, or fine." United States v. Walker, 353 F.3d 130, 134 (2d Cir. 2003). Accordingly, the district court's decision to sentence Wint consecutively to his undischarged sentence was not an abuse of discretion.

4. In reviewing whether the district court properly concluded that Wint was subject to a use/possession enhancement under USSG § 2K2.1(b) (5), "we uphold the sentencing court's factual findings unless they are clearly erroneous, and review its legal determinations de novo, while giving due deference to its application of the Sentencing Guidelines to the facts." United States v. Berg, 250 F.3d 139, 142 (2d Cir. 2001). "Whether, when it comes to 'use' of a firearm, we should distinguish the receipt of guns for drugs (this case) from the receipt of drugs for guns, . . . either situation involves the 'possession' of a firearm (if not its 'use') in connection with the offense." United States v. Smythe, 363 F.3d 127, 129 n.1 (2d Cir. 2004) (internal citation omitted) (upholding an enhancement under USSG § 2D1.1(b) (1)). Based on the district court's finding that the instant conspiracy included "the quid pro quo exchange of drugs for firearms," id at 129, a finding that was not clearly erroneous, the court properly enhanced Wint's offense level under USSG § 2K2.1 (b) (5).

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By:
Lucille Carr, Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2002

Argued: April 3, 2003 Decided: June 12, 2003

Docket Nos. 02-1155L, -1347

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN NMN FULLER, LEYTON WINT,

Defendants-Appellants.

Before:

WALKER, *Chief Judge*,
OAKES and NEWMAN, *Circuit Judges*.

Appeal from the October 24, 2001, and the February 14, 2002, judgments of conviction of the United States District Court for the Southern District of New York (Colleen McMahon, District Judge), sentencing Fuller for being a felon in possession of a firearm and for bail-jumping, and sentencing Wint for firearms offenses.

Fuller's conviction affirmed, and sentence remanded for resentencing; Wint's appeal dismissed as untimely and remanded for entry of new judgment.

COLLEEN P. CASSIDY, Legal Aid Society, Federal Defender Division Appeals Bureau, New York, N.Y., *for Defendant-Appellant Fuller.*

JOHN FULLER, White Deer, Pa., submitted a *pro se* brief.

RICHARD D. WILLSTATTER, Green & Willstatter, White Plains, N.Y., *for Defendant-Appellant Wint.*

JUSTIN S. WEDDLE, Asst. U.S. Atty., New York, N.Y. (James B. Comey, U.S. Atty., Christine H. Chung, Asst. U.S. Atty., New York, N.Y., on the brief), *for Appellee.*

JON O. NEWMAN, *Circuit Judge.*

This appeal in a criminal case primarily concerns three narrow issues, one concerning appellate procedure and two concerning sentencing. The first is the appropriate disposition in a criminal case of an appeal filed after the expiration of the applicable time limit due to defense counsel's oversight. The second is the permissible use of a defendant's criminal conduct in making "horizontal" and "vertical" departures under the Sentencing Guidelines. The third is the methodology for imposing sentences on multiple counts. Leyton Wint and John NMN Fuller appeal from the judgments of the District Court for the Southern District of New York (Colleen

McMahon, District Judge), entered October 24, 2001, and February 14, 2002, respectively. Wint was sentenced primarily to imprisonment for 41 months, and Fuller was sentenced primarily to imprisonment for 151 months, following their convictions for firearms offenses. We conclude that Wint's appeal should be dismissed and the judgment should be remanded for entry of a new judgment, and Fuller's judgment should be remanded for resentencing.

Background

Charges and convictions. Fuller and Wint were both charged with offenses arising out of a gun-running operation in which they traveled to South Carolina, induced individuals there to purchase firearms, and then transported the guns to New York for resale, in violation of 18 U.S.C. §§ 2, 371, 922(a)(1)(A), 922(a)(3), 924(n) (1994 & Supp. 1999). The offense activity was alleged to have occurred between 1996 and 1999. In addition, Fuller was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g) (1994) and, after becoming a fugitive, with bail-jumping, in violation of 18 U.S.C. § 3146 (1994). Wint pled guilty to the gun-running charges. Fuller pled guilty to bail-jumping and went to trial on the firearms charges. The jury convicted him of being a felon in possession of a firearm and could not reach a verdict on the gun-running charges.

Wint's sentence and appeal. The District Court sentenced Wint to imprisonment for41 months, to run consecutively to a prior federal court sentence. The Guidelines calculations need not be detailed since they are not relevant to our disposition of Wint's pending appeal. Judgment in Wint's case was entered October 24, 2001. In a letter to the District Court dated two days later, Wint's counsel asked for an extension of time to file a notice of appeal. On October 26, 2001, Judge

McMahon endorsed the motion "Granted." Neither the letter request nor the Court's endorsement specified the duration of the extension. On May 16, 2002, nearly seven months later, Wint's counsel filed a notice of appeal.

Fuller's sentence. The District Judge began the Guidelines calculation of Fuller's sentence with a base offense level of 14 for the offense of being a felon in possession of a firearm. *See* U.S.S.G. § 2K2.1(a)(6) (2000). Deeming the gun-running activity to be relevant conduct, she found by a preponderance of the evidence that between 25 and 49 guns were involved, resulting in a 5-level enhancement. *See id.* § 2K2.1(b)(1)(E). She then added 4 levels for Fuller's leadership role, *see id.* § 3B1.1(a), 2 levels for obstruction of justice (bail-jumping), *see id.* § 3C1.1,[1] and, in an adjustment challenged on appeal, 2 levels for his use of a minor in the course of the offense conduct, *see id.* § 3B1.4. This last enhancement was based on a finding that Wint was less than eighteen when Fuller first recruited him for the gun-running activity. These enhancements brought the adjusted offense level to 27. In the initially applicable Criminal History Category ("CHC") II, the sentencing range would have been 78-97 months.

Judge McMahon then made two departures. First, she made a "vertical" departure, increasing the adjusted offense level by 2 levels because she considered the 2-level obstruction of justice enhancement inadequate to reflect the full extent of Fuller's conduct. In addition to becoming a fugitive, he had threatened a witness and suborned the witness's perjury. Second, in an action challenged on this appeal, she made a "horizontal" departure, increasing Fuller's CHC from II to IV.

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[1] Where a defendant is sentenced for both an underlying offense and failure to appear (other than failure to appear for service of a sentence), the failure to appear is treated as an obstruction enhancement under section 3C1.1, and the offenses are grouped together under section 3D1.2(c). *See* U.S.S.G. § 2J1.6, comment. (n.3).

Based on Fuller's possession of a .357 magnum firearm and his having bartered guns for drugs, Judge McMahon concluded that CHC II did not adequately reflect the seriousness of Fuller's past conduct. *See* U.S.S.G. § 4A1.3.

The combination of an adjusted offense level of 29 and CHC IV yielded a sentencing range of 121-151 months. Judge McMahon imposed a sentence of imprisonment for 151 months, comprising 121 months on the felon-in-possession charge and a consecutive sentence of 30 months on the bail-jumping charge. The 151-month sentence runs concurrently with the undischarged portion of a state sentence. Fuller filed a timely notice of appeal.

Discussion

I. Wint's Appeal

There is no dispute that Wint requested his counsel to file a notice of appeal and that counsel did not file a notice until several months after expiration of the maximum allowable 40-day period. *See* Fed. R. App. P. 4(b) (10 days after entry of judgment for filing notice of appeal, plus up to 30 days upon grant of extension for excusable neglect or good cause). The parties are also in agreement that appellate time limits are jurisdictional, *see Browder v. Director*, 434 U.S. 257, 264 (1978); *United States v. Rodgers*, 101 F.3d 247, 252 (2d Cir. 1996), and that counsel's failure to file a timely appeal in a criminal case, when requested by a defendant, constitutes ineffective assistance of counsel, entitling the defendant to relief, *see Garcia v. United States*, 278 F.3d 134, 137 (2d Cir. 2002). The issue is what relief is appropriate.

Wint contends that after dismissing the appeal for lack of jurisdiction, we should remand for resentencing. The Government urges a remand for entry of a new judgment to

replace the existing judgment, which the Government concedes could be successfully challenged under 28 U.S.C. § 2255 (2000). Courts granting relief for a successful section 2255 motion challenging counsel's ineffectiveness in not pursuing a direct appeal have used either the resentencing remedy, *see Hollis v. United States*, 687 F.2d 257, 259 (8th Cir. 1982), or the more limited remedy of entry of a new judgment, *see United States v. Stearns*, 68 F.3d 328, 331 (9th Cir. 1995), *abrogated on other grounds, Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000). We have given a district court the choice of remedies. *See Garcia*, 278 F.3d at 138.

Our initial question is whether, on an appeal over which we lack appellate jurisdiction, our only option is to dismiss for lack of jurisdiction and take no further action. We think we are not so limited in making an appropriate disposition. We regard lack of appellate jurisdiction as the absence of authority to adjudicate the merits of an appeal. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21 (1994) ("[N]o statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy.").

In other contexts where courts have lacked appellate jurisdiction, they have taken action other than simply dismissing the appeal. The most obvious example is the disposition prescribed by the Supreme Court for an appeal over which an appellate court ceases to have jurisdiction because of mootness. In that circumstance, the appellate court has the "duty . . . to set aside the decree below and to remand the cause with directions to dismiss." *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936); *see United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). As the Supreme Court has stated, " 'If a judgment has become moot [while awaiting review], this Court may not consider its merits, but may make such disposition of the whole case as justice may

require.' " *U.S. Bancorp*, 513 U.S. at 21-22 (*quoting Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944)) (alteration in original). Recognizing that when a case becomes moot while on appeal we lack jurisdiction, we have regularly responded to mootness by dismissing the appeal and at the same time following the *Duke Power/Munsingwear* instruction by vacating the judgment and remanding with directions to dismiss the complaint. *See, e.g., Van Wie v. Pataki*, 267 F.3d 109, 115-16 (2d Cir. 2001); *Dennin v. Connecticut Interscholastic Athletic Conference, Inc.*, 94 F.3d 96, 102 (2d Cir. 1996); *see also Brooks v. Travelers Insurance Co.*, 297 F.3d 167, 172 (2d Cir. 2002) (dismissing appeal and vacating order on appeal); *Haley v. Pataki*, 60 F.3d 137, 142 (2d Cir. 1995) (same); *Bragger v. Trinity Capital Enterprise Corp.*, 30 F.3d 14, 17 (2d Cir. 1994) (dismissing appeal and remanding with directions to vacate).

We have also ruled that where the filing in a district court of a so-called 10-day motion, *see* Fed. R. Civ. P. 59, destroyed our jurisdiction to adjudicate the appeal, we had a limited jurisdiction not only to rule that we lacked jurisdiction to adjudicate "but also to take those steps appropriate to implement a decision declining jurisdiction." *Hertzner v. Henderson*, 292 F.3d 302, 304 (2d Cir. 2002). Furthermore, we have taken appropriate action, unrelated to the merits, despite the absence of a notice of appeal invoking our jurisdiction. For example, when a prisoner moves in this Court for a certificate of appealability prior to filing a notice of appeal in a district court, we send the request to the district court with instructions to treat the request as a notice of appeal. *See Marmolejo v. United States*, 196 F.3d 377, 378 (2d Cir. 1999).

If in this case we were simply to dismiss and remit the defendant to his section 2255 remedy, we would precipitate at least one and possibly two other unfortunate consequences.

First, we would incur the waste of time and judicial resources to process the section 2255 motion. Second, we would expose the defendant to the risk that he would use up his first opportunity to file a section 2255 motion, thereby subjecting him to the stringent standards applicable to a second section 2255 motion. *See* 28 U.S.C. § 2255, ¶ 8. Although the defendant would have a substantial argument that his initial section 2255 motion should not count as a "first" motion for purposes of section 2255, ¶ 8, because it was needed to obtain entitlement to direct review, rather than to present a collateral challenge after direct review, *see Esposito v. United States*, 135 F.3d 111, 112-14 (2d Cir. 1997); *United States v. Scott*, 124 F.3d 1328, 1329-30 (10th Cir. 1997), that argument itself would precipitate litigation that should be avoided if possible. Third, dismissal of the appeal would leave the current judgment in place, at least until the granting of a motion under section 2255, thereby risking expiration of a substantial part and possibly all of the one-year limitations period of 28 U.S.C. § 2255, ¶ 6, unless the time devoted to taking the steps required to obtain an appealable judgment were deemed to toll the one-year period.

Rather than limit our disposition to a dismissal, which would precipitate a section 2255 motion, we think the most appropriate disposition is to dismiss the appeal as untimely and remand to the District Court with instructions to vacate the judgment and enter a new judgment from which a timely appeal may be taken. At first glance, that course appears to run afoul of the usual rule that a court may not normally circumvent appellate time limits by entering a new judgment. *See Mendes Junior International Co. v. Banco do Brasil, S.A.*, 215 F.3d 306, 312-15 (2d Cir. 2000). However, the appropriate strictness of that rule need not apply to a case such as the pending one where the judgment is vulnerable to being set aside in any event, not simply to overlook an unexcused

late filing of a notice of appeal but to remedy a denial of constitutional right. In remanding for entry of a new judgment despite our lack of appellate jurisdiction, we are not adjudicating any aspect of the merits of the appeal that Wint wishes to pursue from his judgment of conviction; we are taking only preliminary steps to enable him to pursue that appeal in a manner that will provide a sound jurisdictional basis for whatever ruling is ultimately made on the merits of that appeal.

II. Fuller's Appeal

Enhancement for using a minor. Judge McMahon enhanced Fuller's offense level by 2 levels for using a minor in the gun-running activity, *see* U.S.S.G. § 3B1.4. Fuller disputes the finding that Wint was a minor when Fuller recruited him. Although the Court's factual finding is subject to review only for clear error, *United States v. Zichettello*, 208 F.3d 72, 108 (2d Cir. 2000), the current record as to Wint's age at the time Fuller recruited him is sufficiently unclear to support such a finding without further inquiry.

The District Court relied on Wint's allocution when entering his guilty plea, various sentencing documents, and trial testimony, but did not hold a *Fatico* hearing. Wint stated at his plea allocution that "[d]uring 1997 and 1998 I agreed with others to deal in guns." Wint turned eighteen on January 10, 1997. Fuller might have recruited Wint during the first 10 days of 1997, before Wint's eighteenth birthday, but his statement does not so indicate. As for sentencing documents, Wint's presentencing report ("PSR") stated that Wint "may have been under the age of 18" when Fuller introduced him to gun-running. In an effort to minimize Wint's role in the offense, his counsel escalated this tentative assessment by writing to the Court that "it is clearly stated in the [PSR] that Mr. Wint at the time of the criminal activity was a youth

(under 18)." Defense counsel's letter is something less than an unequivocal admission. The PSR also indicated that Wint met Fuller in September 1996 and first accompanied him to South Carolina during the subsequent holiday season, believing Fuller to be involved with marijuana trafficking. The PSR also reports Wint's statement that he did not participate in gun-running until September 1997. The trial testimony cited by the Government establishes only that Fuller (but not necessarily Wint) was involved in gun-running in South Carolina as early as July 1996 and that a witness dealt with Fuller and Wint in July 1997 (after Wint's eighteenth birthday).

Fuller might have recruited Wint for gun-running before January 10, 1997, but the record thus far developed is unclear on the point. Since Fuller must be resentenced in any event, *see infra*, clarification that Wint was recruited before his eighteenth birthday is warranted. Of course, further inquiry will not be needed if the Government declines to press for the "recruiting" enhancement, or if the District Court determines that, because of an upward departure, the same sentence would be imposed whether or not the enhancement is made, *see United States v. Bermingham*, 855 F.2d 925, 934-35 (2d Cir. 1988).

Horizontal departure. In increasing Fuller's CHC from II to IV pursuant to U.S.S.G. § 4A1.3, Judge McMahon relied on Fuller's possession of a .357 magnum revolver, which had been the basis of a dismissed charge in South Carolina, and his bartering of guns for drugs. Fuller contends that this horizontal departure was improper because both acts were part of his relevant criminal conduct. The Government concedes that the horizontal departure was improper, but contends that on remand the bartering of guns for drugs can be the basis of a vertical departure to increase the offense level, pursuant to U.S.S.G. § 5K2.0. Fuller responds that it would be imper-

missible on remand to convert any part of the horizontal departure into a vertical departure.

The two types of departures must be kept distinct, *see United States v. Tropiano*, 50 F.3d 157, 162-64 (2d Cir. 1995), and only acts "not relevant to the offense of conviction" may be used to make a horizontal increase in the CHC, *see United States v. Kim*, 896 F.2d 678, 683 (2d Cir. 1990). As the Government recognizes, Fuller's possession of the .357 magnum was unavailable for a horizontal departure because it was one of the weapons included in the total that resulted in a relevant conduct enhancement in the offense level, and having been so counted, would not be an available basis for a vertical departure, at least in the absence of some extraordinary circumstances concerning that weapon.

The bartering of guns for drugs, if not technically "relevant conduct" for purposes of an offense-specific adjustment, was sufficiently related to the offense to make it also unavailable as a basis for a horizontal departure. Nevertheless, such conduct remained available as a basis for a vertical departure to increase the offense level because it played no part in setting the base offense level or any of the offense-specific adjustments. *See United States v. Hernandez*, 941 F.2d 133, 140-41 (2d Cir. 1991) (drug-dealing purpose of weapon possession available for vertical departure after possession of weapon included in offense level determination); *Kim*, 896 F.2d at 683 (physical injury inflicted in course of fraud offense offered as example of conduct appropriate for vertical departure). Simply because the District Court used the bartering activity for the wrong kind of departure is not a reason to preclude its use on remand for a permissible type of departure.

Imposition of aggregate sentence. Although not noticed by either party, an easily correctable error occurred in the impo-

sition of Fuller's aggregate sentence of 151 months. We identify the matter to avoid its repetition after the resentencing, which must take place in any event.

After determining that Fuller's sentencing range was 121-151 months, Judge McMahon selected 151 months as the appropriate term of imprisonment. Because the maximum sentence on the count charging Fuller with being a felon in possession of a weapon was 10 years, *see* 18 U.S.C. §§ 922(g), 924(a)(2), she sentenced him to 120 months on that count. Then, attempting to impose the balance of the 151-month total punishment, she sentenced Fuller to a consecutive term of 30 months on the bail-jumping count, resulting in a combined term that was one month less than her announced total punishment of 151 months. The written judgment attempted to rectify the arithmetic error by stating the punishment on the felon-in-possession count to be 121 months, but this was one month more than the statutory maximum for that count. Furthermore, the consecutive sentence of 30 months was not in conformity with the requirements of U.S.S.G. §§ 5G1.2(b) and 5G1.2(d). Subsection 5G1.2(b) provides that the total punishment shall be imposed on *each* count up to the statutory maximum (here, 120 months on the felon-in-possession count and 60 months on the bail-jumping count, 18 U.S.C. § 3146(b)(1)(A)(ii)), and subsection 5G1.2(d) provides that if a sentence on a count carrying the highest statutory maximum punishment (here, the felon-in-possession count) is less than the total punishment, the sentence on a remaining count shall be imposed consecutively but "only to the extent necessary to produce a combined sentence equal to the total punishment." Thus, the correct way to have sentenced Fuller to implement Judge McMahon's orally pronounced total punishment of 151 months would have been to sentence him to 120 months on the felon-in-possession count and 60 months on the bail-jumping charge, with 31

months of the latter sentence to run consecutively.[2] *See United States v. McLeod*, 251 F.3d 78, 83-84 (2d Cir. 2001). This method of imposing an aggregate sentence assures that if the sentence on the count carrying the greater punishment is ever vacated, the sentence on the remaining count will effectuate the total punishment to the extent of the statutory maximum for that count.

Conclusion

On Wint's appeal, we dismiss for lack of jurisdiction, and remand with directions to enter a new judgment, from which a timely appeal may be taken. On Fuller's appeal, we affirm the conviction,[3] and remand for resentencing consistent with this opinion.

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[2] We suggest that the prosecutor should have promptly alerted the District Judge to the arithmetic error in implementing the 151-month sentence in the oral statement of the sentence on the two counts, and the probation officer should have assisted the Judge in preparing a written judgment that correctly imposed sentence on both counts.

[3] We have considered and rejected Fuller's remaining contentions, including those raised in his *pro se* brief.

Statutory Appendix

1. The Due Process Clause of the United States Constitution, Amendment V, provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

2. The Jury Trial Clause of the United States Constitution, Amendment VI, provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law

* * *.

3. Section 3553 of Title 18 of the United States Code, titled "Imposition of a Sentence," provides, in relevant part, as follows:

(a) **Factors to be considered in imposing a sentence.**-The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider-

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed-

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most

effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for-

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement-

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) **Application of guidelines in imposing a sentence.**-

(1) **In general.**-Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) **Child crimes and sexual offenses.**-

(A) **Sentencing.**-In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless-

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the

Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that-

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing

Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) **Statement of reasons for imposing a sentence.** -The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence-

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

* * * * *

4. Section 3742 of Title 18 United States Code, titled "Review of a sentence," provides as follows:

(a) **Appeal by a defendant.**-A defendant may file a notice of

appeal in the district court for review of an otherwise final sentence if the sentence-

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition

of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) **Appeal by the Government**.-The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence-

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) **Plea agreements**.-In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure-

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) **Record on review**.-If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals-

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) **Consideration**.-Upon review of the record, the court of appeals shall determine whether the sentence-

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based

on a factor that-

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) **Decision and disposition**.-If the court of appeals determines that-

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in

the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and-

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) **Sentencing upon remand**.-A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that-

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that-

(A) was specifically and affirmatively included in the written

statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) **Application to a sentence by a magistrate judge**.-An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) **Guideline not expressed as a range**.-For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) **Definitions.**-For purposes of this section-

(1) a factor is a "permissible" ground of departure if it-

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

5. 18 U.S.C. § 922(a). - Unlawful acts
(a) It shall be unlawful -

(1) for any person -

(A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or in the course of

such business to ship, transport, or receive any firearm in interstate or foreign commerce; or

(B) except a licensed importer or licensed manufacturer, to engage in the business of importing or manufacturing ammunition, or in the course of such business, to ship, transport, or receive any ammunition in interstate or foreign commerce;

(2) for any importer, manufacturer, dealer, or collector licensed under the provisions of this chapter to ship or transport in interstate or foreign commerce any firearm to any person other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, except that -

(A) this paragraph and subsection (b)(3) shall not be held to preclude a licensed importer, licensed manufacturer, licensed dealer, or licensed collector from returning a firearm or replacement firearm of the same kind and type to a person from whom it was received; and this paragraph shall not be held to preclude an individual from mailing a firearm owned in compliance with Federal, State, and local law to a licensed importer, licensed manufacturer, licensed dealer, or licensed collector;

(B) this paragraph shall not be held to preclude a licensed importer, licensed manufacturer, or licensed dealer from depositing a firearm for conveyance in the mails to any officer, employee, agent, or watchman who, pursuant to the provisions of section 1715 of this title, is eligible to receive through the mails pistols, revolvers, and other firearms capable of being concealed on the person, for use in connection with his official duty; and

(C) nothing in this paragraph shall be construed as applying in any manner in the District of Columbia, the

Commonwealth of Puerto Rico, or any possession of the United States differently than it would apply if the District of Columbia, the Commonwealth of Puerto Rico, or the possession were in fact a State of the United States;

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State, except that this paragraph (A) shall not preclude any person who lawfully acquires a firearm by bequest or intestate succession in a State other than his State of residence from transporting the firearm into or receiving it in that State, if it is lawful for such person to purchase or possess such firearm in that State,

(B) shall not apply to the transportation or receipt of a firearm obtained in conformity with subsection (b)(3) of this section, and

(C) shall not apply to the transportation of any firearm acquired in any State prior to the effective date of this chapter;

(4) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machinegun (as defined in section 5845 of the Internal Revenue Code of 1986), short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Secretary consistent with public safety and necessity;

(5) for any person (other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) to transfer, sell, trade, give, transport, or deliver any firearm to any person

(other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector) who the transferor knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the transferor resides; except that this paragraph shall not apply to

(A) the transfer, transportation, or delivery of a firearm made to carry out a bequest of a firearm to, or an acquisition by intestate succession of a firearm by, a person who is permitted to acquire or possess a firearm under the laws of the State of his residence, and

(B) the loan or rental of a firearm to any person for temporary use for lawful sporting purposes;

(6) for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter;

(7) for any person to manufacture or import armor piercing ammunition, except that this paragraph shall not apply to -

(A) the manufacture or importation of such ammunition for the use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(B) the manufacture of such ammunition for the purpose of exportation; and

(C) any manufacture or importation for the purposes of

testing or experimentation authorized by the Secretary;

(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, except that this paragraph shall not apply to -

(A) the sale or delivery by a manufacturer or importer of such ammunition for use of the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof;

(B) the sale or delivery by a manufacturer or importer of such ammunition for the purpose of exportation;

(C) the sale or delivery by a manufacturer or importer of such ammunition for the purposes of testing or experimenting authorized by the Secretary; and

(9) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.

6. 18 U.S.C. § 924(n). - Penalties

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

7. U.S.S.G. § 3B1.1.Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity

that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b)If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c)If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Commentary

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider

include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of §3B1.1©).

8. U.S.S.G. § 2K2.1

Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

1. (a) Base Offense Level (Apply the Greatest):

(1) 26, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(2) 24, if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;

(3) 22, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

(4) 20, if --

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); and the defendant (i) was a prohibited person at the time the

defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. § 922(d);

(5) 18, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30);

(6) 14, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; or (B) is convicted under 18 U.S.C. § 922(d);

(7) 12, except as provided below; or

(8) 6, if the defendant is convicted under 18 U.S.C. § 922(c), (e), (f), (m), (s), (t), or (x)(1).

(b) Specific Offense Characteristics

(1) If the offense involved three or more firearms, increase as follows:

	Number of Firearms	Increase in Level
(A)	3-7	add 2
(B)	8-24	add 4
(C)	25-99	add 6
(D)	100-199	add 8
(E)	200 or more	add 10.

(2) If the defendant, other than a defendant subject to subsection (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5), possessed all ammunition and firearms solely for lawful sporting purposes or collection, and did not unlawfully discharge or otherwise unlawfully use such firearms or ammunition, decrease the offense level determined above to level 6.

(3) If the offense involved a destructive device, increase by 2 levels.

(4) If any firearm was stolen, or had an altered or obliterated serial number, increase by 2 levels.

Provided, that the cumulative offense level determined above shall not exceed level 29.

(5) If the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

(6) If a recordkeeping offense reflected an effort to conceal a substantive offense involving firearms or ammunition, increase to the offense level for the substantive offense.

(c) Cross Reference

(1) If the defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or

intent that it would be used or possessed in connection with another offense, apply --

(A) §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; or

(B) if death resulted, the most analogous offense guideline from Chapter Two, Part A, Subpart 1 (Homicide), if the resulting offense level is greater than that determined above.

Commentary

Statutory Provisions: 18 U.S.C. §§ 922(a)-(p), (r)-(w), (x)(1), 924(a), (b), (e)-(i), (k)-(o); 26 U.S.C. § 5861(a)-(l). For additional statutory provisions, see Appendix A (Statutory Index).

Application Notes:

1. "Firearm" includes (i) any weapon (including a starter gun) which will, or is designed to, or may readily be converted to, expel a projectile by the action of an explosive; (ii) the frame or receiver of any such weapon; (iii) any firearm muffler or silencer; or (iv) any destructive device. see 18 U.S.C. § 921(a)(3).

2. "Ammunition" includes ammunition or cartridge cases, primer, bullets, or propellent powder designed for use in any firearm. see 18 U.S.C. § 921(a)(17)(A).

3. A "firearm described in 26 U.S.C. § 5845(a)" includes: (i) a shotgun having a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; a rifle having a barrel or barrels of less

than 16 inches in length; or a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (ii) a machinegun; (iii) a silencer; (iv) a destructive device; and (v) certain unusual weapons defined in 26 U.S.C. § 5845(e) (that are not conventional, unaltered handguns, rifles, or shotguns). For a more detailed definition, refer to 26 U.S.C. § 5845.

A "firearm described in 18 U.S.C. § 921(a)(30)" (pertaining to semiautomatic assault weapons) does not include a weapon exempted under the provisions of 18 U.S.C. § 922(v)(3).

4. "Destructive device" is a type of firearm listed in 26 U.S.C. § 5845(a), and includes any explosive, incendiary, or poison gas -- (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses; any type of weapon which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in diameter; or any combination of parts either designed or intended for use in converting any device into any destructive device listed above. For a more detailed definition, refer to 26 U.S.C. § 5845(f).

5. For purposes of this guideline:

"Controlled substance offense" has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of Terms Used in Section 4B1.1).

"Crime of violence" has the meaning given that term in §4B1.2(a) and Application Note 1 of the Commentary to §4B1.2.

"Felony conviction" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. A conviction for an offense committed prior to age eighteen years is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

6. For purposes of subsections (a)(4)(B) and (a)(6), "prohibited person" means any person described in 18 U.S.C. § 922(g) or § 922(n).

7. "Felony offense," as used in subsection (b)(5), means any offense (federal, state, or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.

8. Subsection (a)(7) includes the interstate transportation or interstate distribution of firearms, which is frequently committed in violation of state, local, or other federal law restricting the possession of firearms, or for some other underlying unlawful purpose. In the unusual case in which it is established that neither avoidance of state, local, or other federal firearms law, nor any other underlying unlawful purpose was involved, a reduction in the base offense level to no lower than level 6 may be warranted to reflect the less serious nature of the violation.

9. For purposes of calculating the number of firearms under subsection (b)(1), count only those firearms that were unlawfully

sought to be obtained, unlawfully possessed, or unlawfully distributed, including any firearm that a defendant obtained or attempted to obtain by making a false statement to a licensed dealer.

10. Under subsection (b)(2), "lawful sporting purposes or collection" as determined by the surrounding circumstances, provides for a reduction to an offense level of 6. Relevant surrounding circumstances include the number and type of firearms, the amount and type of ammunition, the location and circumstances of possession and actual use, the nature of the defendant's criminal history (e.g., prior convictions for offenses involving firearms), and the extent to which possession was restricted by local law. Note that where the base offense level is determined under subsections (a)(1) - (a)(5), subsection (b)(2) is not applicable.

11. A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and a two-level enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.

12. If the only offense to which §2K2.1 applies is 18 U.S.C. § 922(i), (j), or (u), or 18 U.S.C. § 924(l) or (m) (offenses involving a stolen firearm or stolen ammunition) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4) unless the offense involved a firearm with an altered or obliterated serial number. This is because the base offense level takes into account that the firearm or ammunition was stolen.

Similarly, if the offense to which §2K2.1 applies is 18 U.S.C. §

922(k) or 26 U.S.C. § 5861(g) or (h) (offenses involving an altered or obliterated serial number) and the base offense level is determined under subsection (a)(7), do not apply the adjustment in subsection (b)(4) unless the offense involved a stolen firearm or stolen ammunition. This is because the base offense level takes into account that the firearm had an altered or obliterated serial number.

13. Under subsection (b)(6), if a record-keeping offense was committed to conceal a substantive firearms or ammunition offense, the offense level is increased to the offense level for the substantive firearms or ammunition offense (e.g., if the defendant falsifies a record to conceal the sale of a firearm to a prohibited person, the offense level is increased to the offense level applicable to the sale of a firearm to a prohibited person).

14. Under subsection (c)(1), the offense level for the underlying offense (which may be a federal, state, or local offense) is to be determined under §2X1.1 (Attempt, Solicitation, or Conspiracy) or, if death results, under the most analogous guideline from Chapter Two, Part A, Subpart 1 (Homicide).

15. For purposes of applying subsection (a)(1), (2), (3), or (4)(A), use only those felony convictions that receive criminal history points under §4A1.1(a), (b), or (c). In addition, for purposes of applying subsection (a)(1) and (a)(2), use only those felony convictions that are counted separately under §4A1.1(a), (b), or (c). see §4A1.2(a)(2); §4A1.2, comment. (n.3).

Prior felony conviction(s) resulting in an increased base offense level under subsection (a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(4)(B), or (a)(6) are also counted for purposes of determining criminal history points pursuant to Chapter Four, Part A (Criminal History).

16. An upward departure may be warranted in any of the following circumstances: (1) the number of firearms substantially exceeded 200; (2) the offense involved multiple National Firearms Act weapons (e.g., machineguns, destructive devices), military type assault rifles, non-detectable ("plastic") firearms (defined at 18 U.S.C. § 922(p)); (3) the offense involved large quantities of armor-piercing ammunition (defined at 18 U.S.C. § 921(a)(17)(B)); or (4) the offense posed a substantial risk of death or bodily injury to multiple individuals.

17. A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an Armed Career Criminal. see §4B1.4.

18. As used in subsections (b)(5) and (c)(1), "another felony offense" and "another offense" refer to offenses other than explosives or firearms possession or trafficking offenses. However, where the defendant used or possessed a firearm or explosive to facilitate another firearms or explosives offense (e.g., the defendant used or possessed a firearm to protect the delivery of an unlawful shipment of explosives), an upward departure under §5K2.6 (Weapons and Dangerous Instrumentalities) may be warranted.

19. The enhancement under subsection (b)(4) for a stolen firearm or a firearm with an altered or obliterated serial number applies whether or not the defendant knew or had reason to believe that the firearm was stolen or had an altered or obliterated serial number.

(2)

Supreme Court, U.S.
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No. 04-503

In the Supreme Court of the United States

LEYTON WINT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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LEYTON WINT, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). This Court has granted certiorari in *United States* v. *Booker*, No. 04-104 (Aug. 2, 2004), and *United States* v. *Fanfan*, No. 04-105 (Aug. 2, 2004), to consider whether *Blakely* applies to the federal Sentencing Guidelines, and, if so, how federal sentencing should be conducted in light of such a conclusion. If the Court were to hold that *Blakely* applies to the Guidelines, the proper disposition of petitioner's claim could be affected by such a holding (as well as by any applicable doctrines of waiver, forfeiture, and harmless error). Accordingly, the petition for a writ of certiorari should be held pending this Court's decisions in *Booker*

and *Fanfan*, and then disposed of as appropriate in light of the decisions in those cases.*

PAUL D. CLEMENT
Acting Solicitor General

NOVEMBER 2004

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* The government waives any further response to the petition unless this Court requests otherwise.